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No. 05-908

IN THE
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

(1) How are the Equal Protection rights of public high school students affected by the jurisprudence of *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003)?

(2) Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?

(3) May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance between whites and nonwhites in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

The petitioner, Parents Involved in Community Schools, is a Washington nonprofit corporation. Seattle School District No. 1, one of the defendants below, is a political subdivision of the State of Washington.

In addition to the parties listed in the caption, the following individuals were named as defendants in all the proceedings below: Joseph Olchefske, in his official capacity as Superintendent; Barbara Schaad-Lamphere, in her official capacity as President of the Board of Directors of Seattle Public Schools; Donald Neilson, in his official capacity as Vice President of the Board of Directors of Seattle Public Schools; and Steven Brown; Jan Kumasaka; Michael Preston; and Nancy Waldman, in their official capacities as members of the Board of Directors.

On February 6, 2006, pursuant to S. Ct. R. 35.3, Petitioner requested the substitution of subsequently elected school board members as follows:

Respondent Joseph Olchefske, the Superintendent of Schools, has been replaced as Superintendent by Raj Manhas. Respondent Barbara Schaad-Lamphere, President of the Board of Directors of Seattle Public Schools, has been replaced as President by Brita Butler-Wall. Respondent Donald Neilson, Vice-President of the Board of Directors of Seattle Public Schools, has been replaced as Vice President by Cheryl Chow. Respondents, Steven Brown, Jan Kumasaka, Michael Preston, Barbara Peterson and Nancy Waldman, members of the Board of Directors of the Seattle Public Schools, have been replaced as members of the Board of Directors by Sally Soriano, Darlene Flynn, Michael DeBell, Mary Bass, and Irene Stewart.

RULE 29.6 STATEMENT

The petitioner is a nonprofit corporation. It has no parent company, and no publicly held companies hold any stock of the petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES viii

PETITIONER'S BRIEF 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. The District Denies Children Admission to Their Chosen Schools Because of Their Race. 3

II. The Schools Vary Widely in Quality and Program Offerings. 3

III. The District's Assignment Plan 5

IV. Denying Children Admission to Their Chosen Schools Because of Race Harms Families. 7

V. Post-Suit Changes to the Plan 10

VI. The School Board Repeatedly Rejected Other Modifications Proposed by District Staff. 11

VII. The Race Preference Does Not Remedy School Segregation but Merely Seeks a Predetermined White to Nonwhite Ratio. 12

VIII. Seattle High Schools Are Already Diverse. 13

IX. A Race-Based Plan Is Not Needed to Ensure Access to "Racially Balanced" Schools. 15

X. The Plan's Effect on Diversity Is Trivial. 16

XI. Race-Neutral Plans Were Never Considered. 17

XII. Proceedings Below 19

SUMMARY OF ARGUMENT 21

ARGUMENT 23

I. Racial Classifications Are Presumptively Invalid and Must Be Subjected to the Strictest Judicial Scrutiny. . 23

II. The District's Plan Uses Racial Balancing and Thereby Violates Our Color-Blind Constitution. 25

A. Except to Remedy Past Discrimination, Racial Balancing Is Unconstitutional. 25

B. The Essence of Racial Balancing Is Mechanical Use of a Quantitative Criterion Based on Race. 27

C. The District's Race Preference Is a Clear Case of Racial Balancing. 29

D. Racial Balancing Is Not Justified by a Desire to Obtain the Benefits of Diversity. 29

E. Racial Balancing Is Not Justified as a Desegregation Measure, Because Seattle High Schools Are Not Segregated 30

F. Racial Balancing Is Not Excused by the Fact That Every Child Is Entitled to Obtain a High School Education. 31

G. Racial Balancing Is Not Excused Because It Discriminates Sometimes Against One Race and Sometimes Against Another. 32

III. The District's Plan Fails Both Prongs of Strict Scrutiny. 33

A. The District Cannot Establish That Its Race Preference Serves Any Compelling Government Interest. 33

1. Racial diversity in high schools is not a "compelling interest." 34

2. Trivial changes in pigmentation diversity at a few already diverse schools cannot be a compelling interest. 36

3. Avoiding the effects of voluntary choices is not a compelling governmental interest. 38

B. The District Cannot Show That Its Plan Is Narrowly Tailored. 39

1. The race preference is not necessary to accomplish its stated purpose. 39

2. The race preference cannot satisfy the other narrow tailoring requirements set out in *Grutter* and *Gratz*. 42

a. The District did not consider alternative plans. 42

b. The race preference is a quota. 43

c. The race preference provides no individual consideration. 44

d. The race preference causes undue harm. 45

e. The plan has no sunset provision. 45

IV. The Deference Advocated by the Majority and Concurring Opinions Below Is Incompatible with the Equal Protection Clause. 46

A. The Court of Appeals Improperly Deferred to Local School Boards. 46

B. "Academic Freedom" Does Not Justify Deference to Local School Boards. 47

C. Deference to the Seattle School District Is Especially Unwarranted. 48

D. Relaxing the Standard of Review, Whether Explicitly or Implicitly through Deference, Would Encourage Racial Balancing. 49

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995) ..... *passim*

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) 40

In re Birmingham Reverse Discrimination Employment Litigation,
20 F.3d 1525 (11th Cir. 1994) 28

Brewer v. West Irondequoit Central School District, 212 F.3d 738 (2d Cir. 2000) 28

Brown v. Board of Education,
347 U.S. 483 (1954) 25, 48, 49

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) 38

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) ..... *passim*

Coral Construction Co. v. King County,
941 F.2d 910 (9th Cir. 1991) 34

Cunico v. Pueblo School District No. 60,
917 F.2d 431 (10th Cir. 1990) 28

Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999) 28

Florida Star v. B.J.F., 491 U.S. 524 (1989) 38

Freeman v. Pitts, 503 U.S. 467 (1992) 27, 33

Goss v. Lopez, 419 U.S. 565 (1975) 24, 48

Gratz v. Bollinger, 539 U.S. 244 (2003) ..... *passim*

Grutter v. Bollinger, 539 U.S. 306 (2003) .....*passim*

Hirabayashi v. United States,
320 U.S. 81 (1943) 23

Ho v. San Francisco Unified School District,
147 F.3d 854 (9th Cir. 1998).....28, 34, 40

Hopwood v. Texas,
78 F.3d 932 (5th Cir. 1996).....34

Hunter v. Regents of University of California,
190 F.3d 1061 (9th Cir. 1999).....28

Johnson v. Board of Regents of University of Georgia, 263 F.3d 1234 (11th Cir. 2001).....28

Johnson v. California,
543 U.S. 499 (2005) 23, 24, 35, 47

Keyes v. School District No. 1,
413 U.S. 189 (1973) 31

Keyishan v. Board of Regents,
385 U.S. 589 (1967) 47

Lomack v. City of Newark,
2005 WL. 2077479 (D. N.J. 2005).....50

Loving v. Virginia, 388 U.S. 1 (1967).....33

Lutheran Church-Missouri Synod v. FCC,
141 F.3d 344 (D.C. Cir. 1998) 28, 34

Metropolitan Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990) .....*passim*

Miller v. Johnson,
515 U.S. 900 (1995) .....*passim*

Monterey Mechanical Co. v. Wilson,
125 F.3d 702 (9th Cir. 1997) 28, 32

Parents Involved in Community Schools v. Seattle School District No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001) 1

Parents Involved in Community Schools v. Seattle School District No. 1, 285 F.3d 1236 (9th Cir. 2002) 1

Parents Involved in Community Schools v. Seattle School District No. 1, 294 F.3d 1084 (9th Cir. 2002) 1

Parents Involved in Community Schools v. Seattle School District No. 1, 149 Wash. 2d 660, 72 P.3d 151 (2003) 1

Parents Involved in Community Schools v. Seattle School District No. 1, 377 F.3d 949 (9th Cir. 2004) 1

Parents Involved in Community Schools v. Seattle School District No. 1, 395 F.3d 1168 (9th Cir. 2005) 1

Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162 (9th Cir. 2005) 1

Perry v. Sindermann, 408 U.S. 593 (1972) 45

Petit v. City of Chicago,
352 F.3d 1111 (7th Cir. 2003) 50

Plessy v. Ferguson, 163 U.S. 537 (1896) 25

Plyler v. Doe, 457 U.S. 202 (1982) 48

Podberesky v. Kirwan,
38 F.3d 147 (4th Cir. 1994) 28

Powers v. Ohio,
499 U.S. 400 (1991) 33

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 24

Regents of University of California v. Bakke,
438 U.S. 265 (1978) ..... *passim*

Shapiro v. Thompson, 394 U.S. 618 (1969) 45

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Sherbert v. Verner, 374 U.S. 398 (1963) 45

Smith v. University of Washington,
233 F.3d 1188 (9th Cir. 2000) 28

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 31

Sweezy v. New Hampshire,
354 U.S. 234 (1957) 47

Tuttle v. Arlington County School Board,
195 F.3d 698 (4th Cir. 1999) 28

Wessmann v. Gittens,
160 F.3d 790 (1st Cir. 1998) 28

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) ..... *passim*

Zervos v. Verizon N.Y., Inc.,
252 F.3d 163 (2d Cir. 2001) 28

STATUTES

42 U.S.C. § 1983 ..... 2, 10

42 U.S.C. § 2000d 2, 10, 25

28 U.S.C. § 1254(1) 1

U.S. Const., amend. XIV, § 1 ..... *passim*

MISCELLANEOUS

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PETITIONER'S BRIEF

The petitioner, Parents Involved in Community Schools ("Parents"), respectfully requests the Court to reverse the court of appeals and hold that the Seattle School District's race-based student admission plan is unconstitutional.

OPINIONS BELOW

The initial opinion herein was that of the district court, reported at 137 F. Supp. 2d 1224 (W.D. Wash. 2001) and submitted in the appendix to Parents' petition ("Pet. App.") at 269-303. On appeal to the court of appeals for the Ninth Circuit, the three-judge panel rendered opinions reported at 285 F.3d 1236 (9th Cir. 2002), addressing Parents' state law claims. Those opinions were withdrawn, 294 F.3d 1084 (9th Cir. 2002), and state law issues were certified, 294 F.3d 1085 (9th Cir. 2002), to the Washington Supreme Court, whose opinions are reported at 72 P.3d 151, 149 Wash.2d 660 (2003). The subsequent opinions of the three-judge panel of the court of appeals deciding Parents' federal law claims are reported at 377 F.3d 949 (9th Cir. 2004) and submitted at Pet. App. 129-268. The court of appeals granted rehearing *en banc*, 395 F.3d 1168 (2005), and its opinions, issued on October 20, 2005, are reported at 426 F.3d 1162 (9th Cir. 2005) and submitted at Pet. App. 1-128.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2005. A timely petition for a writ of certiorari was filed on January 18, 2006, and granted on June 5, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

2. 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, provides in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

I. The District Denies Children Admission to Their Chosen Schools Because of Their Race.

Wishing to create a predetermined racial balance in its better and more popular high schools, Seattle School District No. 1 ("the District") uses a race-based student admissions plan. Although children may choose to attend any of ten high schools in the city regardless of where they live, five schools have more applicants than openings. The District uses a racial classification to determine who will be admitted to "oversubscribed" schools that it believes are insufficiently racially balanced, admitting students who will move such a school toward the District's desired racial balance in preference to students whose admission would not. Joint Appendix ("JA") 38-42.

For the 2000-01 school year, the District denied over 300 students admission to their chosen schools solely because of race. Eighty-nine students were initially denied admission to their first choice school because they were not white, and 216 were denied admission to any of their preferred schools because they were white. These numbers were reduced slightly by adjustments made before school started, but many students, because of race, were denied admission to schools they had selected. JA 39-41, 162-63, 188. About 30 of these students left the District rather then attend the schools to which they were assigned. JA 163.

II. The Schools Vary Widely in Quality and Program Offerings.

The District operates ten regular high schools. It assigns students pursuant to an "Open Choice" plan whereby students can elect to attend any school in the District regardless of where they live, provided there is space available. Excerpts of Record, Cir. Ct. Docket at 7/24/01

("ER") 580.

The schools vary widely in quality, program offerings, and popularity. This variation is confirmed by objective data as well as testimony from parents and school board members. For the 2000-01 school year, 82% of all students selected one of five high schools as their first choice: Ballard, Franklin, Garfield, Hale, or Roosevelt. The other five schools (Chief Sealth, Cleveland, Ingraham, Rainier Beach, and West Seattle) were selected by 18%. JA 37-38.

Families and the school board use various objective criteria to evaluate school quality: scores on standardized tests, numbers of college preparatory and Advanced Placement ("AP") courses offered, percentage of students who take AP courses and SAT tests, percentage of graduates who attend college, *Seattle Times* college-preparedness rankings, University of Washington rankings, and disciplinary statistics. JA 142, 157, 185, 261-65. The oversubscribed schools score better than the others on these measures of quality. JA 147, 151, 243-46, ER 514, 556-58.[1] The schools also vary in the special academic programs they offer. For example, Ballard offers a Biotech Academy, with separate admissions prerequisites, and Hale offers a "Ninth Grade Academy" and an "Integrated Studies" program. JA 145-46, 180-81.

Owing to these differences, five of the ten high schools are oversubscribed. Three of these (Ballard, Hale, and Roosevelt) are located north of downtown, where the majority of District students are white. JA 161. Two

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[1] Comparisons were submitted to the District Court, ER 126, 228, 261, 435-37, based on data at ER 108-25, 182-220, 226-27, 256-608. That court agreed that the oversubscribed schools were more prestigious, "competition for assignment to those schools is keen," and "students denied their choice of schools are deprived of curriculum advantages not necessarily available at other schools." Pet. App. 271a, 283a n.7.

oversubscribed schools (Franklin and Garfield) are located south of downtown, where the majority of students are nonwhite. JA 161. Of the five undersubscribed schools, three are located south of downtown (Cleveland, Rainier Beach, and Chief Sealth), one is north (Ingraham), and one is west (West Seattle). JA 310.

Some of the oversubscribed schools have a predominantly white student population and some have a predominantly nonwhite population. At Ballard, Hale, and Roosevelt, white students compose between 54% and 62% of the population. Garfield is 53% nonwhite. Franklin is also predominantly nonwhite, approximately 80%. JA 284-87. [2]

III. The District's Assignment Plan.

The District adopted the current high school assignment plan in 1997 for implementation in the 1998-99 school year. Under this plan, students may select any school in the district. They are assigned, where possible, to the school they list as their first choice. If a student is not admitted to her first-choice school because it is full, the District tries to assign her to her second-choice school, and so on. If a student is not admitted to any of her chosen schools, she will receive a mandatory assignment to a school with available space. Once a student is admitted to a school, she need not reapply in subsequent years. JA 163.

If a high school has fewer openings than the number of students who select it as a first choice, the District uses a set of preferences – what it calls "tiebreakers" – to determine who may attend. JA 91-92, 101. The first preference favors students with a sibling already attending a school and accounts for about 10% of assignments. JA 189-90.

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[2] Of the less popular schools, Cleveland and Rainier Beach have white populations of 10% and 8%; the other three are "balanced" by the District's definition. ER 622.

The next tiebreaker gives preference to race. JA 38, 101. The racial balance of students enrolled in all of Seattle's public schools is about 40% white and 60% nonwhite, JA 379, and the school board has decided that the student body at each of the popular high schools should reflect that balance. JA 214-15. If the population of an oversubscribed school deviates by more than a set number of percentage points from the desired ratio, then a student whose race will move a school closer to the desired racial balance will be admitted in preference to students of a different race. JA 38; ER 134, 583.

For purposes of this preference, a student is deemed to be of the race specified in her registration materials. When initially registering for Seattle's public schools, parents must identify the race of each child by using codes on a form. ER 170-71. If a parent declines to specify a race, the child is assigned a race by the District, based on a visual inspection of the parent or the student. JA 194; ER 623.[3]

From 1998 to 2001, the race preference was triggered by a deviation of 10 percentage points from the 40:60 ratio. During that period, if the race preference was triggered with respect to a school, it determined all admissions of new students to that school in that year. (After this suit was filed the permissible deviation from the 40:60 ratio was expanded and the operation of the preference was modified. *Infra* p. 10.) Once all applicants in the preferred racial category are admitted, any remaining seats are allocated based on distance from the school. A final tiebreaker, a lottery, is rarely used, because distance is calculated to 1/100 of a mile. ER 134, 621.

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[3] Until 1997, a student could change her racial category for admissions purposes once a year. ER 262-65 (correspondence from parents complaining about the new prohibition on changing races). The District appears to again allow students to change racial categories. http://www.seattleschools.org/area/eso/ethniccodechange.pdf.

For the 2000-01 school year, four of the five oversubscribed schools were deemed by the District to be too far out of racial balance ("integration positive"): Ballard, Franklin, Hale, and Roosevelt. JA 38. Therefore, race decided many of the admissions decisions at those four schools. Of the oversubscribed schools, only Garfield was sufficiently "balanced" that no admissions for that school were determined by race. JA 39.

IV. Denying Children Admission to Their Chosen Schools Because of Race Harms Families.

The plight of two families illustrates the consequences of the District's racial classification scheme for many families in Seattle. Jill Kurfirst and Winnie Bachwitz are members of Parents. Each has a child who entered high school in the 2000-01 school year, with plans to attend college. JA 179, 185. Like many parents, it was important to them that their children attend a school close to home that offered a variety of college preparatory courses, graduated students with high scores on standardized tests, and provided an environment conducive to learning. JA 157-59, 185.

After reviewing test statistics, course offerings, extracurricular programs, college rankings, disciplinary statistics, and proximity to their homes, the Kurfirst and Bachwitz children applied for admission to Ballard High School as their first choice.[4] They identified Roosevelt and Hale as second and third choices. JA 156-57, 183-84, 300.

They chose Ballard first, partly because of its unique Biotech Academy. Both students met the separate prerequisites and application deadlines for the program and

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[4] For many members of Parents, Ballard was attractive because it is the closest school to the Queen Anne, Magnolia, and Ballard neighborhoods. The District had encouraged parents to support this school and view it as part of their communities. JA 177, 310, ER 471.

were accepted. JA 157, 180. For Ms. Kurfirst, admission to Ballard High School was especially important because the biotech program provided a curriculum well-suited to the particular educational needs of her son, Andy. JA 156; ER 454. This view was shared by Andy's middle school principal and the principal at Ballard. JA 143-44.

Both children were denied admission to Ballard because they were white and consequently were not allowed to enroll in the biotech program. They were also denied admission to Roosevelt and Hale because of their race. Both were assigned to Ingraham. JA 152-54, 156; ER 278.

In addition to the school's weaker test scores, paucity of college preparatory offerings, and unfavorable disciplinary statistics, Ingraham created a hardship for these families because of its distance from their homes. JA 158, 185-86.

Attending school close to home has many advantages, the most obvious being reduced transportation time and hazards. When students travel long distances to school on multiple buses (especially public transportation), they lose a significant part of every school day. Safety is also a concern when boys and girls wait at bus stops early in the morning and in the evening. Attending school far from home makes it difficult for students and parents to participate in after-school and extracurricular activities and for students to form new friendships. Academic performance also benefits from proximity to school by facilitating parental involvement and increasing the frequency and quality of communication between parents and teachers, which has a positive effect on the children's school work. JA 156.

When assignments were announced for 2000-01, the District did not run school buses to Ingraham from the Queen Anne or Magnolia neighborhoods, where Ms. Kurfirst and Ms. Bachwitz lived. Attendance at Ingraham would have

required their children to take three city buses to get to school, resulting in a round-trip commute of over four hours. Both students had hoped to participate in after-school activities. At Ingraham that would have required each of them to leave home at 5:30 a.m., return at 8:00 or 9:00 p.m., and on each trip to wait for three buses, often alone and in the dark. Little time would have remained for homework and family activities. JA 158, 186.

Assignment to Ingraham being unacceptable to both families, they appealed, without success. Ms. Kurfirst felt she had no choice but to move out of Seattle. Andy attended a parochial high school, and her younger child enrolled in a public elementary school in another school district. ER 451. Ms. Bachwitz sent her daughter to a parochial school. JA 156, 184-85. These families were fortunate to have such options. However, Parents has members of various races and from various parts of the city. JA 182-83. Not all affected families have such options.

Initially, over 300 students were denied admission to their chosen schools because of race. The District was able to accommodate some of those students in their first-choice schools by increasing the capacity of some schools and making other adjustments. Ultimately, 205 students were denied admission to their first choice schools because of race. Of these, 84 students, because of race, received assignments to schools they did not list on their selection rankings. After receiving their assignments, 30 of the 84 chose not to enroll in the Seattle public schools. JA 162-63.

Parents of some of the affected students formed Parents Involved in Community Schools ("Parents"), a nonprofit corporation whose members are Seattle families with children who have been or may be affected by the District's

race preferences. JA 30.[5]

V. Post-Suit Changes to the Plan

In July 2000, after school assignments for the 2000-01 year had been announced and appeals by members of Parents had been rejected, Parents filed this suit. JA 31. The District subsequently modified the admissions plan, and the changes reduced slightly the number of race-based assignments for 2001-02. JA 38, 241-43; ER 539, 600.

First, the District broadened the permissible deviation from its preferred 40:60 ratio to 15 percentage points instead of 10. JA 148, 163; ER 585-86. This change meant that Roosevelt High School qualified as balanced and thus only three of the oversubscribed schools were sufficiently out of balance to trigger race-based assignments. JA 163. Second, the District installed a "thermostat" so that once a school comes into balance because of sufficient race-based assignments, no further race-based assignments to that school will be made that year. JA 164; ER 590. Third, the District limited the use of race to applications from students entering the ninth grade. JA 163.

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[5] The three-judge panel below said there was "little doubt that the associational aspects of Parents' standing has not been mooted." Pet. App. 141a, 211a n.2. In its opposition to Parents' petition, the District suggested for the first time that there might not be an active case or controversy. *See* Brief in Opposition, pp. 20-21 It is undisputed that Parents is an association of "parents whose children have been or may be denied admission to the high schools of their choosing solely because of race," JA 30, and that Parents' corporate purpose is the promotion of neighborhood schools, ER 100. *See* http://www.piics.org/index.html. To dispel any doubt, Parents have submitted a letter pursuant to S. Ct. R. 32(3) requesting permission to lodge an affidavit of the association's president identifying other members of Parents with young children currently in Seattle public schools who will likely be affected by the District's race preferences when applying for high school admission.

In the course of this litigation, the court of appeals enjoined the use of the race preference. That injunction was vacated, and the District has refrained from reinstating the race preference while this case is pending.[6] Pet. App. 138a.

VI. The School Board Repeatedly Rejected Other Modifications Proposed by District Staff.

In 1999, after a year of operating under the "Open Choice" plan (and before this suit was filed), District staff and Superintendent Olchefske recommended that the school board narrow the use of race by increasing from 10 to 20 percentage points the acceptable deviation from the 40:60 ratio. This proposal was rejected. JA 165-66; ER 542.

In October 2000 (after this suit was filed), District staff made the same recommendation to the board. According to the recommendation, narrowing the use of race by adopting a 20-point "band" would not prevent the District from achieving its goals. JA 149; *see also* JA 245-46; ER 540-41, 572.[7] Olchefske also proposed reinstating a preference for a student who had ranked a school higher on her application, so that a student who identified a school as her first choice would be admitted before a race-preference student who had listed the school as a lower choice. These proposals were rejected. JA 148-49, 243; ER 607.

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[6] The District's website states that the plan has been "suspended . . . due to pending litigation." Frequently Asked Questions, *Middle & High School Choices 2006-2007: Enrollment Guide for Parents*, http://www.seattleschools.org/area/eso/secondaryenrollmentguide20062007.pdf.

[7] The District has variously determined schools to be sufficiently diverse when their racial balance deviates from the District-wide white/nonwhite ratio by as much as 25 percentage points, 20 points, 15 points (the 2001-02 test), and 10 points (the 1998-2001 test). JA 148-49; ER 585-86, 617.

VII. The Race Preference Does Not Remedy School Segregation but Merely Seeks a Predetermined White to Nonwhite Ratio.

The District refers to "integration" and "segregation" when explaining its rationale for using a race-based admissions plan. *E.g.*, JA 75. However, the District did not adopt its racial balancing plan to remedy past discrimination. Seattle does not operate and has never operated a segregated or dual school system. JA 214, 225, 257. Under the District's plan, any student can attend any high school in the system, provided there is space available, and even without a race preference every high school in the system hosts significant percentages of white, African American, Asian American, and Latino students. JA 283-92. So the District's plan does not involve "integration" or "desegregation," but is designed merely to alter slightly the white/nonwhite ratio at the oversubscribed schools.

Before litigation began, the District set out its rationale for race-based admissions in a formal statement by the board of directors. This statement explains that the school system "is fortunate to have the pluralism brought by the African American, American Indian, Asian American, Hispanic, and White Communities and by the multiethnic groups within each." JA 168. It asserts that "Diversity in the classroom increases the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races. Diversity is thus a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world." JA 168. The statement also credits diversity with strengthening our democratic society by enhancing the educational process and fostering racial and cultural understanding. JA 168. The diversity thus offered to the public as the reason for using racial classifications is a notion of diversity that considers the contributions made by students of different races, ethnicities, and cultures.

Notwithstanding these expansive claims, the only result actually promoted by the race preference is slightly increased pigmentation diversity at a few schools. The District's plan does not recognize any cultural or ethnic diversity and does not even recognize any racial diversity among nonwhites, but lumps together all ethnic and racial categories other than non-Hispanic whites. JA 2419-50; ER 484, 583-84. By the District's definition, a school is sufficiently diverse only if a certain percentage of students in that school are white. JA 216; ER 585-86.

The District offers no meaningful explanation for its decision to disregard differences within and among racial groups. According to the school board president, the District focuses only on pigmentation because "skin tone matters," ER 584, 601, and because of "history" – this is how they have always done it, ER 584-85, 601; JA 250.

VIII. Seattle High Schools Are Already Diverse.

The District argued below that its use of race is necessary to obtain diversity in the popular schools and prevent schools from becoming "racially isolated." JA 74, 87; ER 635. However, Seattle's public high schools are racially diverse and will continue to be if the District drops its race preference. All high schools contain significant percentages of students of different races. In 2000-01, in the undersubscribed schools, where race played no role in admissions, the student bodies were composed as follows:

	Asian American	African American	Latino	White	Native American
Chief Sealth	27%	18%	21%	32%	3%
Cleveland	43%	35%	10%	10%	2%
Ingraham	38%	19%	9%	30%	4%
Rainier Beach	30%	52%	8%	8%	2%
West Seattle	26%	15%	10%	46%	2%

JA 288-92, 308-10; ER 666-70. In the oversubscribed schools, if race had been removed from the assignment equation and nothing else was changed, the assignments would have looked like this:

	Asian American	African American	Latino	White	Native American
Garfield	12.5%	34.7%	4.4%	47.2%	1.1%
Franklin	39.3%	34.6%	5.5%	19.8%	0.8%
Hale	17.4%	12.1%	6.4%	60.8%	3.3%
Ballard	14.7%	8.9%	9.6%	62.6%	4.3%
Roosevelt	26.8%	6.7%	8.7%	54.8%	3%

JA 283-87.

Without the use of race, nonwhite enrollment at Ballard, Hale, and Roosevelt (the three whitest schools in the district) would have been 37.4%, 39.2%, and 45.2%, respectively. Assignments to Franklin would have been 19.8% white and 80.2% nonwhite. JA 288-92, 308-10.

The central assumption in the District's justification for its race preference is that a race-neutral, neighborhood assignment plan would have a significant detrimental effect on the diversity of Seattle's high schools. *See* ER 513, 593.

However, this assumption is irrelevant, because Seattle has an "Open Choice" plan and no one is proposing a neighborhood assignment plan. In any event, the District's assumption is unsupported by any data, since the District did nothing in the way of research or projections to determine what the schools would look like if race played a lesser role or no role in its plan. JA 195-97, 224-25, 252-56.[8] The District did not attempt to learn the racial breakdown of city neighborhoods, JA 207-08, or to account for the fact that, as the superintendent acknowledged, some traditionally minority neighborhoods are fast becoming less so, while traditionally white areas are changing "rapidly" as well, JA 234.[9]

IX. A Race-Based Plan Is Not Needed to Ensure Access to "Racially Balanced" Schools.

In a deposition, the District's superintendent confirmed that its interest in race-based assignments is "diversity" for its educational value, JA 224-25, and he added another interest: the "idea of ability of movement and choice . . . ." ER 540. As explained in the District's briefing below, this means making it possible for students whose neighborhood school is "racially concentrated" to attend a school that is

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[8] The District is left to rely on the testimony of its demographer, Morgan Lewis, who merely testified that the District cannot accomplish its preferred white/nonwhite ratio "unless some students are assigned to schools other than their nearest or next nearest school." JA 209-10.

[9] Census data show these changes. In 1990, eight of Seattle's 12 recognized neighborhoods had a percentage of white residents greater than the city as a whole. Between 1990 and 2000, seven of those eight neighborhoods saw increases in minority populations ranging from three to almost 10 percentage points. Profile of General Demographic Characteristics (Census 2000); City of Seattle, Race and Hispanic/Latino Ethnicity by Tract (2000); City of Seattle Sub-Area Profiles, 1990 (1993), *http://www.seattle.gov/dpd/Research/Population_Demographics/Overview/default.asp*. The District's own data show that Seattle's neighborhoods are integrated. Of the 61 "reference areas" for elementary schools, not one has a minority student population of less than 20%. JA 44.

not. *See, e.g.*, Resp. Br. 42, Cir. Ct. Docket at 9/10/01.

However, barriers to this kind of mobility do not exist, regardless of whether the District employs a race preference. If a student objects to attending one of the two schools that have small white populations (or any other school), she can attend West Seattle (west of downtown), Sealth (south of downtown), or Ingraham (north of downtown). All three of those schools are balanced by the District's definition, and because they are not oversubscribed, admission is guaranteed. JA 38. She could also select Garfield (the top school in the District by many measures), which is also "balanced," though she would have to compete with other students for a seat, as that school is oversubscribed. JA 38.

X. The Plan's Effect on Diversity Is Trivial.

The effect of the race preference in 2000-01 was a marginal change in the white/nonwhite balance at four oversubscribed high schools. The minority population at Ballard increased by a little over 6%, at Hale by less than 2½%, and at Roosevelt by a little over 3½%. JA 283-87. The white population at Franklin increased by fewer than 5½%. JA 308-10.[10] Because the plan uses race in admissions decisions for oversubscribed schools only, it does not affect racial balance at the remaining high schools, including the two that are the farthest out of balance by the District's definition, Cleveland and Rainier Beach. ER 530.

No identifiable benefits result from these small changes

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[10] The District prefers to focus on the change in the composition of just the ninth grade classes assigned to those schools in 2000-01. *See, e.g.*, ER 591. Those statistics show changes in the racial balance in ninth grade admissions at schools that were already diverse and that would continue to be diverse without the use of race. Moreover, the plan is designed to maintain the District's favored "balance" over time, which is just a few percentage points different from the ratio that would obtain without use of a race preference.

in the white/nonwhite ratios at schools that already have substantial racial diversity. JA 237; ER 586, 598-99. Below, the District and its expert extolled the benefits of an "integrated" education, yet ignored that the Seattle high school system is already integrated. Dr. Trent did no analysis specific to Seattle; his conclusions pertain to differences between "segregated" and "integrated" school systems generally. He said nothing about the supposed benefit of increasing enrollment of minority or white students by a few percentage points in a few already-integrated schools.[11] In fact, he testified that the benefits he believes result from "integrated" schools are obtained when schools have a "significant presence" of non-white students, and that "a 25-percent presence or a nearly 25-percent presence is a significant presence," ER 657 (which would be found in Seattle's oversubscribed schools without the use of a race preference). He further testified that to obtain the benefits of diversity, a school district needed to look beyond white and nonwhite categories and consider diversity among nonwhites, JA 277-79; ER 652-53, something the District's plan does not do.

XI. Race-Neutral Plans Were Never Considered.

District officials testified unequivocally that they did not consider using race-neutral alternatives. Asked whether the District gave "any serious consideration to the adoption of a plan . . . that did not use racial balancing as a factor or a goal," the superintendent testified, "*I think the general answer to that question is no.* . . . I mean it's possible informally ideas were floated here or there, but I don't remember any significant staff work being done." JA 224 (emphasis added). Other testimony confirmed this

[11] In addition, Parents' expert, Dr. David Armor, testified that Dr. Trent's report was not supported by the evidence he cited, was based on subjective measures, and did not base its conclusions on data pertaining to the Seattle School District. JA 294-98.

admission: the District never asked its demographer to analyze the effect of using race-neutral alternatives such as a lottery or a tiebreaker that relied on nonracial characteristics (*e.g.*, socio-economic status, primary language, or other factors tracked by the District), JA 197-200; the head of the Facilities, Planning, and Enrollment Department was unaware of any consideration of any race-neutral plans, JA 307; and a board member confirmed that dropping race from admissions decisions had "never been considered," ER 509.

There are numerous color-blind and less race-driven alternatives the District could have considered and used to promote its goals of "diversity" and "ability of movement and choice." For example, the District could have used a lottery to determine admission to oversubscribed schools. This would result in each such school's reflecting the racial balance of the students interested in attending that school. Since 82% of entering ninth grade students select one of the oversubscribed schools (in a district that is 60% minority), a lottery would likely result in significant minority enrollment in each of the popular schools. This alternative was never considered. JA 196-200, 252-255.

The District could develop magnet programs to make the less attractive schools desirable to more parents. Board members testified that parental choice patterns change as efforts are made to improve the quality and perception of individual schools and their programs. JA 212-13, 239-41; ER 536-37. The District also could have considered plans such as the Urban League's proposal in which race plays a lesser role and students would have priority for admission to neighborhood schools and to schools with magnet programs for which they qualified. This proposal was presented to the District after suit was filed but was never formally discussed at any board meeting. JA 210, 257-60; ER 643. Some members of the board actually refused to read it. ER 573.

Instead of considering only skin color, the District could construct an assignment plan that promotes a broader, more holistic concept of diversity. The District already collects a variety of information about each child and her family: whether the child lives at home or in "an agency"; if she lives at home, with whom; whether she has received special education services or has health conditions affecting her educational needs; whether English or some other language is the child's home language; and eligibility for free or reduced-price lunches. These statistics are used to determine how much money an individual school will receive to educate a particular child, JA 197-99; ER 170, 569, but they play no role in admissions.

At a minimum, the District could have adopted the 1999 and 2000 recommendations of its superintendent and staff to narrow the use of race by broadening to 20 percent the band of permissible deviation from "balance." This would have reduced the number of schools at which the race preference operated and, according to the superintendent, would have had no "negative impact." JA 148-50, 245-46. The District also could have followed the 2000 staff recommendation to give admissions priority at a school to students who selected it as their first choice. JA 148-50.

XII. Proceedings Below

Parents filed this suit under 42 U.S.C. § 1983, asserting violations of the Equal Protection Clause and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, as well as state law claims. JA 31. On cross motions, the district court granted summary judgment in favor of the District (so there were no findings of fact). Pet. App. 269-303. The judge found no violation of state law, the Equal Protection Clause, or the federal Civil Rights Act. On appeal to the Ninth Circuit, a three-judge panel unanimously found for Parents on the state law claim and enjoined the use of the race preference. The

panel later withdrew that decision, vacated the injunction, and certified the state law issues to the Washington Supreme Court, which decided those issues in favor of the District.

While the federal claims were still pending, this Court decided *Grutter* and *Gratz*. The parties rebriefed and reargued Parents' Equal Protection claim in light of those decisions. The panel decided in favor of Parents, holding that the District's plan was not narrowly tailored because it is indistinguishable from a "pure racial quota" and "fails virtually every one of the narrow tailoring requirements." Pet. App. 165. One judge dissented. Pet. App. 211-68.

A rehearing *en banc* resulted in a decision in favor of the District by a vote of seven (including one concurrence) to four. Pet. App. 1-128. The *en banc* majority, relying on the observation in *Grutter* that "context matters," extended the reasoning in that decision to hold that racial diversity can be a compelling governmental interest for high schools. *E.g.*, Pet. App. 33. The majority also held that much of the narrow tailoring analysis of *Grutter* and *Gratz* does not apply in the high school context, *e.g.*, Pet. App. 42, 47-8, so that, *inter alia*, a mechanical racial preference can satisfy the narrow tailoring prong of strict scrutiny when implemented to achieve a pre-determined white/nonwhite ratio. In reaching this conclusion, the majority deferred to the judgment of the school board regarding the need for a racial preference. *E.g.*, Pet. App. 51-2, 57-8. It also held that a racial classification does not "unduly harm any students" so long as it does not "uniformly benefit any race or group of individuals to the detriment of another." Pet. App. 59-60. One judge concurred in the judgment, advocating adoption of a "rational basis" standard of review. Pet. App. 63-70.

Four judges dissented. Pet. App. 71-128. They rejected the majority's "relaxed," "deferential" standard of review, Pet. App. 72, 77; its deference to the school board,

Pet. App. 95, 98-99, 112-13; and its group rights theory of the Equal Protection Clause, Pet. App. 115-19. The dissent concluded that, when strict scrutiny is applied, the District's racial preference is unconstitutional because it seeks to accomplish only a predetermined white/nonwhite ratio (not "genuine" diversity), *e.g.*, Pet. App. 84-86, 100, 125-26; because the plan operates as a quota, Pet. App. 108-11; and because it is not narrowly tailored as required by *Grutter* and *Gratz*, Pet. App. 101, 111-15, 119-25.

SUMMARY OF ARGUMENT

Any racial classification, by any government entity, is presumptively invalid and must be subjected to the strictest judicial scrutiny. That has been for many years the consistent holding of this Court, and the government bears the burden of proving that its racial classification is narrowly tailored to achieve a compelling state interest.

Because it uses racial balancing, the District's program for race-based admissions is *ipso facto* unconstitutional. Racial balancing prefers one individual to another for no reason other than race and thereby violates the heart of the Equal Protection Clause – the principle that our Constitution is color-blind. Race-based admissions are justified neither by school officials' desire to obtain the benefits of diversity nor as a desegregation measure (as Seattle high schools are not segregated), nor are they excused either by the fact that every child is entitled to obtain a high school education (there is discrimination nonetheless) or by the fact that the program sometimes discriminates against one race and sometimes against another (because Equal Protection rights belong to individuals, not groups).

Since the District's race-based admissions plan employs racial balancing, which is always unconstitutional, the plan cannot possibly withstand strict scrutiny. That the

plan does not serve a compelling state interest is established by *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), both of which condemned racial balancing. Since racial diversity is the result of, and can only be accomplished by means of, racial balancing, *Grutter* and *Gratz* together establish that there can be no compelling state interest in achieving mere racial diversity. Why? Because a racial diversity program treats people as mere components of a racial class, not as individuals; it is founded on a concept too amorphous to admit of any logical stopping point; and its supposed benefits are so uncertain and impose so much hardship that it cannot qualify as an interest compelling enough to warrant the use of racial classifications.

The District's race preference plan in particular serves no compelling interest because its only result is trivial changes in pigmentation diversity at a few already diverse schools. The District tries to prevent the effect of voluntary choices by families about where to live and where to go to school, but there is no compelling governmental interest in avoiding the effects of general societal discrimination, nor, *a fortiori*, in avoiding the effects of purely voluntary choices.

The District also cannot show that its plan is narrowly tailored to serve any compelling interest because: Seattle high schools are already integrated and diverse; race neutral alternatives would likely increase diversity just as much as the race preference; the District did not consider race-neutral alternatives; the plan is an impermissible quota; the plan provides for no individual consideration of applicants; it causes significant harm to hundreds of individual students for no discernible educational benefit; and it has no logical ending point.

Given these flaws, why did the court of appeals find that the District's race preference plan was narrowly tailored

to serve a compelling government interest? Both the *en banc* majority and the concurring opinion did so because of excessive deference to local school boards. They applied, in fact if not in name, a rational basis standard rather than strict scrutiny. However, deference to local school boards on matters of race is incompatible with enforcement of the Equal Protection Clause, and the strict scrutiny standard will be emasculated if it can be satisfied merely by a finding that government officials have acted reasonably and in good faith. Yet that would be the result of affirming the decision of the court of appeals in this case.

ARGUMENT

I. Racial Classifications Are Presumptively Invalid and Must Be Subjected to the Strictest Judicial Scrutiny.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). All racial classifications by government are "inherently suspect," *id.* at 223, and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993).

This Court's decisions repeatedly confirm that all racial classifications reviewable under the Equal Protection Clause must be subjected to the "strictest of judicial scrutiny," regardless of the race of the person asserting those rights, and regardless of the allegedly benign motives of the government. *Gratz*, 539 U.S. at 270 (quoting *Adarand*, 515 U.S. at 224); *Johnson v. California*, 543 U.S. 499, 505 (2005). This Court also has repeatedly rejected distinctions between racial classifications by government as part of policies of "inclusion" and policies of "exclusion" – both

must be subject to strict scrutiny. *E.g., compare Gratz*, 539 U.S. at 270, *with id.* at 282 (Breyer, J., concurring in the judgment), and *id.* at 298-301 (Ginsburg, J., dissenting); *compare Adarand*, 515 U.S. at 224, *with id.* at 247-48 & n.6 (Stevens, J., dissenting). In *Gratz*, no racial hostility or intent to segregate was alleged, yet the racial classification at issue was subjected to strict scrutiny and struck down. 439 U.S. at 270; *id.* at 298 (Ginsburg, J., dissenting); *accord Shaw v. Reno*, 509 U.S. 630, 650-51 (1993). Therefore, racial classifications by government schools must be subject to the strictest judicial scrutiny, even where school officials do not act out of any racial animus.

This Court has also rejected application of any less exacting standard of scrutiny because of the special expertise of state or local officials, including local school officials, when racial classifications are involved. *See Johnson*, 543 U.S. at 509-15 (refusing to defer to judgment of state prison officials on race even where "those officials traditionally exercise substantial discretion"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality); *id.*, at 294-95 (White, J., concurring) (rejecting school board's judgment regarding the educational benefits of a racially diverse faculty); *see also Goss v. Lopez*, 419 U.S. 565, 574 (1975) (the "Fourteenth Amendment . . . protects the citizens against the State itself and all of its creatures—Boards of Education not excepted") (citations omitted).

Once a plaintiff demonstrates that a government actor uses a racial classification, the government must prove that the classification is narrowly tailored to achieve a compelling interest. *Johnson*, 543 U.S. at 506 n.1; *Gratz*, 539 U.S. at 270; *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (once a plaintiff proves a discriminatory motive in a Title VII case, the burden of proof shifts to the defendant to show that it would have taken the same action regardless of improper motive).

II. The District's Plan Uses Racial Balancing and Thereby Violates Our Color-Blind Constitution.

A racial balancing measure such as Seattle's race-based assignment plan is inherently unconstitutional and, therefore, can never withstand strict scrutiny.[12] Being illegal, racial balancing can never be a means "narrowly tailored" to further a compelling state interest, and racial balance itself cannot qualify as a "compelling state interest" because racial balance is nothing but the intended and necessary result of prohibited conduct, *viz.*, racial balancing.

A. Except to Remedy Past Discrimination, Racial Balancing Is Unconstitutional.

On matters of race, the Equal Protection jurisprudence of this Court begins with Justice Harlan's ringing dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896):

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Id. at 554, 559 (Harlan, J., dissenting). However, after the decision in *Brown v. Board of Education,* 347 U.S. 483 (1954), the color-blind principle was temporarily obscured, for integration of previously segregated schools necessarily required public authorities to know the race of the students who were being reassigned in order to end segregation.

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[12] Because the District receives federal funds, ER 10, its race-based admission plan violates Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, as well. *Gratz*, 539 U.S. at 276 n.23.

Outside the context of desegregation, the color-blind principle applies to school admissions because, as Justice Powell wrote in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* at 307 (Powell, J., concurring). (This was quoted with approval by the Court in *Gratz*, 539 U.S. at 270.) Accordingly, the Court in *Bakke* held unconstitutional a medical school admissions plan that automatically preferred members of certain racial groups "for no reason other than race." 438 U.S. at 307.

What did Justice Powell mean by preferences granted "for no reason other than race"? He certainly did not mean that medical school admissions officials had adopted their plan merely out of sympathy for the races favored or hatred of those disfavored. Rather, he recognized that their interest was in "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession." *Id.* at 306. Nevertheless, Justice Powell rejected that objective "as an unlawful interest in racial balancing" on the part of government. *Grutter*, 539 U.S. at 323 (summarizing *Bakke*). Thus, Justice Powell saw admission preferences granted solely on the basis of race in order to increase racial balance as "discrimination for its own sake," *Bakke*, 438 U.S. at 307, hence unlawful, and the Court in *Grutter* characterized such preferences as unlawful "racial balancing." 539 U.S. at 323.

The reason why ostensibly benign programs of racial balancing so offend the Constitution derives both from the express words of the document and from its philosophical and historical underpinnings in the Declaration of Independence. The Fourteenth Amendment, § 1 states: "[N]or shall any State . . . deny to *any* person . . . the equal protection of the laws" (emphasis added), and when government acting pursuant to law denies someone a benefit

solely because of her race, surely that person is denied the equal protection of the laws. Likewise, she is denied by the state that right to liberty and the pursuit of happiness which the Declaration holds to be self-evident and inalienable. Thus, in matters of race today

> [b]eing an American means refusing to let yourself be pushed or corralled into racial or ethnic group-think, whether on campus, in a neighborhood, at work, or in politics, and it means refusing to promulgate such cultures or to assign ethnic identities to individuals with a glance at their surnames or skins.

Jim Sleeper, *Liberal Racism* xxvii (2002). As the Court observed in *Miller v. Johnson*, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class." 515 U.S. 900, 911 (1995) (quoting *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)) (internal marks omitted); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) ("The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.")

B. The Essence of Racial Balancing Is Mechanical Use of a Quantitative Criterion Based on Race.

After *Bakke*, this Court invalidated other governmental programs that used a racial classification for purposes other than remediation of the effects of past discrimination. *E.g.*, *Adarand*, 515 U.S. 200; *Freeman v. Pitts*, 503 U.S. 467 (1992); *Croson*, 489 U.S. 469; *Wygant*, 476 U.S. 267; *cf. Metro Broad., Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting), 631 (Kennedy, J., dissenting).

"Racial balancing" was expressly condemned in *Croson*, 488 U.S. at 507. Applying the reasoning of these cases and of Justice Powell's opinion in *Bakke*, federal courts of appeal from 1978 until 2003 consistently struck down governmental programs that entailed racial balancing, including race-based admission and assignment plans of secondary and primary schools.[13] Such racial balancing was ruled illegal by this Court in *Gratz*, where the illegal component of the undergraduate school's plan was an admissions point bonus based on race. 539 U.S. at 270.

In her concurring opinion in *Gratz*, Justice O'Connor emphasized that the vice of the challenged plan was its use of a fixed and mechanically applied arithmetic criterion based on race. She distinguished the consideration of race as one "plus" factor among many pursuant to an individualized, holistic review of each application, as in the University of Michigan Law School admissions plan allowed by the Court

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[13] *See, e.g., Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001) (university admissions); *Smith v. Univ. of Wash.*, 233 F.3d 1188 (9th Cir. 2000) (law school admissions); *Eisenberg v. Montgomery Co. Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999) (transfers to magnet school); *Tuttle v. Arlington Co. Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999) (admission to over-subscribed school); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (admission to Boston Latin School); *Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998) (racial quotas for schools); *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998) (radio station hiring); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997) (public contracting); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (college scholarships); *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994) (hiring quotas); *Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431 (10th Cir. 1990) (employment). *Cf. Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000), *superseded on other grounds as stated in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001) (racial balancing may be used to remedy *de facto* as well as *de jure* segregation of schools); *Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999) (allowing racial balancing for research purposes in university laboratory school).

in *Grutter*. *Gratz*, 539 U.S. 276-77 (O'Connor, J., concurring). By contrast, a government school's interest, "to assure within 'its student body some specified percentage of a particular group merely because of its race. . . would amount to outright racial balancing, which is *patently unconstitutional*.'" *Id.* at 329-30 (emphasis added).

Thus, the essential ingredient of racial balancing – and its inherent vice – is the mechanical use of racial classification by means of a quantitative criterion based on race. Such a procedure necessarily grants preferences to some, while discriminating against others, "for no reason other than race." *Gratz*, 539 U.S. at 270 (quoting *Bakke*, 438 U.S. at 307). It necessarily treats people not as individuals but as members of a racial group, and it is thus unconstitutional *per se*. *See Miller*, 515 U.S. at 911.

C. The District's Race Preference Is a Clear Case of Racial Balancing.

The District's admissions plan fits squarely within the definition of "racial balancing" as that term has been used by this Court and the federal courts of appeal. Under this plan, if the racial composition of an oversubscribed high school deviates by more than a set number of percentage points from a ratio of 40% white to 60% nonwhite, a student's race will determine whether or not she is admitted. And when a student's race is thus considered, she is granted or denied admission solely on the basis of whether she is white or nonwhite. *Supra*, p. 6. Under the District's plan, admission to an oversubscribed school is thus based on race to an even greater extent than under the plan condemned in *Gratz*, where race was not the sole determinant of admission.

D. Racial Balancing Is Not Justified by a Desire to Obtain the Benefits of Diversity.

The District seeks to justify its race-based admissions

on the ground that the goal is not racial balance as such, but rather the educational benefits of diversity. *See* Pet. App. 22a; JA 224-25. Of course, the only kind of diversity affected by the race preference is that between whites and nonwhites. Even if that sort of racial diversity were to have educational benefits,[14] the District cannot escape the fact that use of its race preference constitutes illegal racial balancing.

> [E]very action and pursuit is thought to aim at some good. . . . Now, as there are many actions, arts, and sciences, their ends are also many; the end of the medical art is health, that of shipbuilding a vessel, that of strategy victory, that of economics wealth. . . .

Aristotle, *Nicomachean Ethics* I.1 (W.D. Ross transl., Random House 1941). Here the purported end of the District's race preference is educational benefit, but the end does not justify the means or, more precisely, a worthy end does not justify the use of illegal means. As this Court held in *Gratz*, race discrimination, even in pursuit of educational benefits, is unconstitutional. 539 U.S. at 276-77.

E. Racial Balancing Is Not Justified as a Desegregation Measure, Because Seattle High Schools Are Not Segregated.

With or without use of the racial tiebreaker, Seattle high schools are not, and will not become, segregated. *De jure* "segregation" was described by Chief Justice Burger as "maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5-

[14] Belief in such benefits may rest on the assumption that nonwhites, "when left on their own, cannot achieve." *See Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

6 (1971). In *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973), the Court held that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred to in *Swann* is *purpose* or *intent* to segregate." *Id.* at 208. School segregation, whether *de jure* or *de facto*, thus requires a dual system in which pupils are separated according to race into different sets of schools. There is no evidence of this in Seattle. *Supra,* p. 12. Quite to the contrary, even without a race preference, Seattle high schools are integrated and diverse. *Supra*, pp. 13-15.

F. Racial Balancing Is Not Excused by the Fact That Every Child Is Entitled to Obtain a High School Education.

> [A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.

Gratz, 539 U.S. at 270, (quoting *Adarand*, 515 U.S. at 224). High school students are as much entitled to Equal Protection, and to the benefit of the strict scrutiny standard, as are prospective college or law school students or bidders on government contracts. While a high school student has no more right than a college student to attend any particular school, in a system that allows students to attend their preferred schools, the high school student has an equal right not to be denied admission to her chosen school solely because of her race.

The undisputed evidence establishes that Seattle high schools are not fungible, but differ widely in quality, and that for many families, assignment to a school far from home creates substantial hardship. *Supra,* pp. 4-9. Consequently, the preference for one school over another is entirely

reasonable. Denial of high school admission solely on the basis of race may or may not be more detrimental to a student and her family than denial of admission to the University of Michigan. Yet every student at every level has the same constitutional right not to be refused admission because of her race. "There is no *de minimis* exception to the Equal Protection Clause. Race discrimination is never a 'trifle.'" *Monterey Mechanical*, 125 F.3d at 712.

G. Racial Balancing Is Not Excused Because It Discriminates Sometimes Against One Race and Sometimes Against Another.

According to the majority below, the plan "does not uniformly benefit any race or group of individuals to the detriment of another" and thus does not "unduly harm any students in the District." Pet. App. 60. This is a radical departure from this Court's jurisprudence. Equal Protection rights belong to individuals, not racial groups.

> Because the Fourteenth Amendment "protect[s] *persons*, not *groups*," all "governmental action based on race – a group classification long recognized as in most circumstances irrelevant and, therefore, prohibited – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227 (emphasis in original)). This Court has rejected the notion that a racial classification that burdens racial groups equally is somehow less objectionable under the Equal Protection Clause. *E.g.*, *Johnson* 543 U.S. at 506; *Shaw*, 509 U.S. at 651; *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

In this case as well, two wrongs do not make a right, and the District's racial balancing is not excused because its plan operates at some schools to exclude white students and at other schools to exclude nonwhite students. On the contrary, each individual student, whatever her race, has a right not to be discriminated against because of her race, and each act of discrimination is a violation of the Constitution. *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 230.

III. The District's Plan Fails Both Prongs of Strict Scrutiny.

A. The District Cannot Establish That Its Race Preference Serves Any Compelling Government Interest.

Until *Grutter*, this Court recognized only two interests as sufficiently compelling to satisfy strict scrutiny: (1) remediation of the effects of past discrimination for which the government is responsible and (2) preventing "a social emergency rising to the level of imminent danger to life and limb," *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment), or addressing other matters of similar "pressing public necessity" such as national security, *Grutter*, 539 U.S. at 351-52 (Thomas, J., dissenting). Other interests had been rejected by the Court in strong language,[15] leading many lower courts to conclude that no other interest could justify racial classifications. *E.g.*, *Lutheran Church*, 141 F.3d at 354-55; *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996); *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991); *Ho*, 147 F.3d at 865.

In *Grutter*, the Court recognized a third "compelling

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[15] *E.g.*, *Adarand*, 515 U.S. at 222; *Freeman*, 503 U.S. at 494; *Croson*, 488 U.S. at 493 (plurality); *id.* at 524 (Scalia, J., concurring); *Wygant*, 476 U.S. at 274 (plurality); *cf.*, *Metro Broad.*, 497 U.S. at 612-13 (O'Conner, J., dissenting).

interest" that might justify the use of a racial classification: the educational benefits of enrolling a genuinely diverse student body in an institution of higher education (provided race is considered as only one of many factors by which an applicant may contribute to diversity). To reach that decision, the Court deferred to the university's "academic decision" that such genuine or holistic diversity "is essential to its educational mission." *Grutter*, 539 U.S. at 328. In doing so, the Court reconciled the conflicting Equal Protection rights of applicants and the First Amendment rights of a university, including its expansive freedoms of speech and thought and its limited freedom to make judgments regarding "the selection of its student body," *Grutter*, 539 U.S. at 329.

To allow the District's race preferences, the Court must extend *Grutter*, not only by recognizing in local school boards a First Amendment right of academic freedom, but also by holding that mere racial diversity may be a compelling state interest. The latter extension would, of course, overrule *Grutter*, *Gratz*, and other cases that forbid racial balancing.

1. Racial diversity in high schools is not a "compelling interest."

First, pursuit of mere *racial* diversity and its supposed educational benefits entails by definition the pursuit of racial balance and is unconstitutional *per se*. *Supra*, pp. 25-29. The pursuit of racial diversity by the District necessarily means treating students not as individuals but solely as members of racial groups for purposes of participation in a government program. Treating students thus violates the Equal Protection Clause. *See Miller*, 515 U.S. at 911. In *Grutter*, this Court confirmed that such pursuit of mere racial diversity, an attempt to "assure within [a school] some specified percentage of a particular group merely because of

its race or ethnic origin," is "patently unconstitutional." *Grutter*, 539 U.S. at 329-30; *id.* at 337 ("The importance of ... individualized consideration in the context of a race-conscious admissions program is paramount."); *accord Bakke*, 438 U.S. at 307 (Powell, J., concurring).

Second, racial diversity is too amorphous a concept to justify race-based decisions by government. The Court in *Croson* rejected remediation of societal discrimination as a compelling interest in large measure because it was too vague and provided "no logical stopping point." 488 U.S. at 498 (quoting *Wygant*, 476 U.S. at 275). The Court observed that, without any logical limit, such an interest would justify race-based decisions "until the percentage of public contracts awarded to [minority business enterprises] in Richmond mirrored the percentage of minorities in the population as a whole." *Id.*; *accord Metro Broad.*, 497 U.S. at 614 (O'Conner, J., dissenting). Like the proffered interests in those cases, the District's interest in "racial diversity" has no principled or logical limit. If accepted as a compelling interest, it would justify almost any program of racial proportionality.

Third, the educational benefits of racial diversity are far too uncertain to qualify as a compelling state interest, and they are outweighed by the costs that racial classifications necessarily impose. *See Grutter*, 539 U.S. at 328 (racial classifications promote "notions of inferiority and lead to a politics of racial hostility."); *Shaw*, 509 U.S. at 657 (racial classifications, even for remedial purposes "may balkanize us into competing racial factions"); *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting) (racial classification designed to promote diversity "endorse[s] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."). As observed by Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 69 (2002):

> In a culture that ardently affirms the principles of individual freedom, merit, and equality of opportunity, [the] demoralization and anger [precipitated by being victim to government imposed racial classifications] must be counted as a very large social cost. [16]

Fourth, the sociological evidence relied upon by the District is inconclusive and disputed. *See* Pet. App. 91a–95a (summarizing the conflicting studies). For example, one source relied upon by the District itself concludes that "[t]he evidence regarding the impact of desegregation on intergroup relations is generally held to be inconclusive and inconsistent." Pet. App 93a. The expert testimony was likewise conflicting, with the District's expert failing to provide any support for the District's claim that minor adjustments in the white/nonwhite ratio effects any benefit. *Supra*, p. 17. As Judge Bea noted, "One would think that to be 'compelling' there would be no room for doubt of the need for the measure. That is certainly not the case here." Pet. App. 92a. Absent the extraordinary deference accorded to universities in *Grutter*, the weak and conflicting evidence of educational benefits cannot demonstrate that racial diversity in secondary schools constitutes a compelling interest.

2. Trivial changes in pigmentation diversity at a few already diverse schools cannot be a compelling interest.

Strict scrutiny requires examination of what a racial classification actually does, not just what the government

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[16] The District does nothing to verify the accuracy of racial designations and allows for changing those designations. JA 194-95, 313-14. So to these unavoidable costs of racial balancing, the District's plan adds another: operating a system that encourages dishonesty to obtain desired school assignments. *Id.; supra*, p. 6.

says the classification is supposed to accomplish. *See Adarand*, 515 U.S. at 236 (strict scrutiny requires "the most exact connection between justification and classification" and a "detailed examination both as to ends and as to means. . . ." (citations omitted)); *Croson*, 488 U.S. at 500 ("mere recitation" of legitimate purpose and "assurances of good intentions" do not suffice; a racial classification "cannot rest upon a generalized assertion as to the classification's relevance to [government's] goals").

Despite the florid rationale offered for its policy, the District's plan does not seek to accomplish cultural, ethnic, or even racial diversity. All the race preference is actually designed to accomplish is small (2½% to 6%) adjustments to the white/nonwhite balance at a few oversubscribed high schools that are already diverse by any reasonable definition. *Supra,* pp. 14-16. This cannot be a compelling interest.

First, it is outright racial balancing, which is unconstitutional *per se*. *Supra,* pp. 25-27. Second, no evidence suggests that the trivial adjustments in racial balance accomplished by the plan provide any educational, social, civic, or other benefits. *Supra,* p. 17.

Moreover, the District's racial preference does nothing to address the nonwhite concentration in the two schools with the smallest white populations, Ranier Beach (8% white) and Cleveland (10% white). The District's purported interest in its peculiar notion of diversity cannot be sufficiently compelling to justify hundreds of race-based admissions decisions when that interest is not sufficiently powerful to motivate the District to address the schools with the greatest pigmentation "imbalance." The underinclusiveness of the District's plan is fatal, for it shows that the asserted interest is not compelling. Applying strict scrutiny in the First Amendment context, this Court has rejected purported compelling interests where the government's restriction did

not attempt to address all the alleged harm it claimed it was trying to address. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546-47 (1993); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) ("a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." (citations omitted)).

3. Avoiding the effects of voluntary choices is not a compelling governmental interest.

Remedying the effects of general societal discrimination is not a compelling interest. *Croson*, 488 U.S. at 498-99; *Wygant*, 476 U.S. at 276 (plurality); *Bakke*, 438 U.S. at 310 (Powell, J. concurring). Under the District's Open Choice system students can elect to attend any high school in the city, regardless of where they live, provided there is space available. In Seattle, as elsewhere, many families choose to live near people of similar racial and ethnic heritage. JA 40; *see* Abigail Thernstrom & Stephen Thernstrom, *Have We Overcome?*, Commentary, Nov. 2004, at 51-52; Pet. App. 123a.[17] And the District claims that parents tend to select schools close to their homes. *See* Pet. App. 55a. The District attempts to justify its racial balancing plan as an effort to counter the effects of these voluntary choices by families. *See* Pet. App. 49a. However, if remedying effects of past societal discrimination is too amorphous and unlimited to constitute a justification for race-based decisions by government, *see Croson*, 488 U.S. at 498-99, then, *a fortiori*, remedying the anticipated effects of parents' voluntary choices cannot be a compelling interest.

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[17] Even so, the trend in Seattle is toward more integrated neighborhoods. *Supra*, p. 15 n.9.

B. The District Cannot Show That Its Plan Is Narrowly Tailored.

1. The race preference is not necessary to accomplish its stated purpose.

The narrow tailoring component of strict scrutiny requires at a minimum that a racial classification be *necessary* for government to achieve its proffered interest and actually advance that interest. *Croson*, 488 U.S. at 509-511 (plurality); *id.* at 519 (Kennedy, J., concurring) ("strict scrutiny . . . forbids the use even of narrowly drawn racial classifications except as a last resort."); *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting) ("'Strict scrutiny' requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest."). The record shows that the District's race preference is not necessary for the District to accomplish its proffered goals and does next to nothing to advance them.

First, Seattle's high schools are racially diverse and will continue to be if the District simply stops using the race preference. Seattle's population is about 70% white and 30% minority, and the District's students are about 40% white and 60% minority. Without using the race preference, the ten regular high schools would have white populations of 8% (Rainier Beach), 10% (Cleveland), 19% (Franklin), 30% (Ingraham), 32% (Chief Sealth), 46% (West Seattle), 47% (Garfield), 55% (Roosevelt), 60% (Hale), and 62% (Ballard). JA 283-92. In addition, in every school, students of several races make up the nonwhite component. If the race preference were dropped, every Seattle high school would still host significant numbers of white, African American, Asian American, and Latino students, and students could choose to attend schools with a variety of racial compositions. *Supra,* pp. 13-15. The race preference is,

thus, not narrowly tailored because it is not needed for the District to accomplish its proffered goals of racial diversity and the "ability of movement and choice."

Second, the race preference does nothing to address racial balance at the schools with the smallest white populations. Thus, it cannot be narrowly tailored because it does not, in practice, effectuate the ends for which it is used. A classification that does not actually further the ends of government should not survive even a rational basis review. *See, e.g., Bd. of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 367 (2001).

Third, while Parents do not bear the burden of proving it, *supra,* p. 24, the record shows that there are viable alternatives likely to achieve the same educational benefits. Just dropping race and using distance would yield substantial diversity in the oversubscribed schools. Using a lottery to determine admission to oversubscribed schools would also likely increase racial diversity, as would considering some of the other background information the District collects about students. Granting a preference based on any of these factors would mitigate the allegedly problematic effects of relying on distance alone and provide opportunities for students to select a school farther from home without making admissions decisions based on race. *Supra*, pp. 13-15, 18-19.

These alternative tiebreakers are not clumsy proxies for race as the District has argued (they would be unconstitutional if that were their purpose). They would, however, allow the District to pursue a more holistic diversity. Because the District can obtain the educational benefits it purports to seek by striving for a more holistic diversity, a race-based plan that seeks only pigmentation diversity cannot be narrowly tailored. *E.g., Grutter*, 539 U.S. at 342; *Croson* 488 U.S. at 509-11, 519.

Unlike the law school in *Grutter*, which argued it should not have to sacrifice its elite status and high academic admissions standards, the District would sacrifice nothing by adopting an alternative tiebreaker. Race determines about 10% of the District's assignments. If the District used something else (*e.g.*, some measure of socioeconomic status or a lottery number as a tiebreaker) in place of the race preference, 90% of students still would be assigned under the balance of the Open Choice model, preserving the District's goals: diversity, a choice-driven system, and a system in which any student can attend a racially "balanced" school if she chooses.

Fourth, at a minimum, the District could have adopted the narrowing changes proposed by its superintendent and staff. Those changes would not have compromised the District's educational goals, *supra*, pp. 17-19.[18] And finally, as the District points out, improving the quality of a school changes choice patterns. *See* JA 212-13, 238, ER 303-04, 536-37. The District could use magnet programs and other programmatic changes to improve the less popular schools, thus attracting students from around the city.

Because the race preference is not necessary and does little to effect racial diversity in Seattle's oversubscribed high schools, it cannot be narrowly tailored.

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[18] The board rejected the changes simply because they would reduce the number of schools at which the race preference operated, JA 253-26, suggesting that the real goal was to ensure that a race preference was in operation, not to achieve any supposed benefits.

2. The race preference cannot satisfy the other narrow tailoring requirements set out in *Grutter* and *Gratz*.

a. The District did not consider alternative plans.

To survive strict scrutiny, the District bears the burden of showing that it earnestly considered race-neutral alternatives to its racial classification scheme. *E.g., Grutter,* 539 U.S. at 339; *id.,* at 394 (Kennedy, J., dissenting) ("a searching standard . . . would force educational institutions to seriously explore race-neutral alternatives"). However, the record in this case reveals what the panel majority called "an unadulterated pursuit of racial proportionality" and a "stubborn adherence to the use of race for race's sake." Pet. App. 179a. Blinded by its long commitment to thinking about student assignment in racial terms, the District simply assumed without analysis that race-neutral alternatives would not provide the educational benefits it seeks.

The testimony of the District's superintendent, board members, and staff was unequivocal: they never gave "any serious consideration to the adoption of a plan . . . that did not use racial balancing as a factor or goal." *Supra,* pp. 17-19. Consistent with its commitment to a plan that relied on racial preferences, the District never seriously considered the comprehensive alternative assignment and school improvement plan presented by the Seattle Urban League. JA 210, 257-260. One board member testified that he refused to read it. ER 573. To borrow again from Judge O'Scannlain's panel opinion, "[w]ithout belaboring the point, this is not exactly the stuff of which narrow tailoring is made." Pet. App. 178a.

Throughout this litigation, the District has tried to justify its stubborn adherence to using race by arguing that if

it merely assigned students to schools nearest their homes, the result would be segregated schools. *See, e.g.*, Brief in Opposition, pp. 2-3. This is a red herring, because no one has proposed such a plan. Besides, the District's claim is false: "segregated" means far more than merely a racial balance that deviates from the District average. *See, e.g.*, Pet. App. at 73a. The District's contention is not supported by any study, projections, or research, as the District did none, and the record shows that without the use of racial preferences, the oversubscribed schools would enroll very similar percentages of white and nonwhite students. *Supra*, pp. 13-16; JA 197-200.

Because the District did not seriously consider alternative plans, its racial classification is not narrowly tailored. *E.g., Grutter*, 539 U.S. at 339.

b. The race preference is a quota.

The District must also prove that its plan does not operate as a quota. *Grutter*, 539 U.S. at 334; *Croson*, 488 U.S. at 507-08. According to this Court, an unconstitutional quota is "a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded." *Grutter*, 539 U.S. at 335 (citation omitted).

The District's race preference squarely fits the Court's definition of a quota. Under the District's race preference plan, three oversubscribed schools (Ballard, Hale, and Roosevelt) may not enroll more than a pre-determined number of white students if there are nonwhite students who want to attend, and one oversubscribed school (Franklin) may not enroll more than a predetermined number of nonwhite students if there are white students who want to attend. The race preference operates (after 2001) to ensure

that the proportion of white students at each of these popular schools will never exceed 55% nor be allowed to fall below 25%, while the proportion of nonwhite students will never fall below 45% nor exceed 75%. *Supra*, p. 10.

In addition, the plan is designed so that, once a school is brought within the pre-determined range of the district's preferred 40:60 ratio, subsequent ninth grade classes would have to approximate that 40:60 balance (regardless of the white/nonwhite ratio of the applicant pool) for the school to maintain the desired ratio. This "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson,* 488 U.S. at 507 (plurality). Quotas are impermissible regardless of whether there is a merit-based competition and regardless of whether stigma results from the operation of the classification scheme. *See* Pet. App. 207a; *Shaw*, 509 U.S. 630; *Croson*, 488 U.S. 469; *Adarand*, 515 U.S. 200; *Wygant*, 476 U.S. 267.

c. The race preference provides no individual consideration.

An essential component of any constitutional plan to achieve a concept of diversity that includes race is individualized consideration of the other ways in which an applicant contributes to diversity. *Grutter,* 539 U.S. at 337. This is essential to ensure that individuals are not treated solely as members of racial groups, which is the primary purpose of the Equal Protection Clause. *Id.*; *Miller*, 515 U.S. at 911. The District's plan, however, uses a computer algorithm to admit or deny admission to students based solely on whether a student is white or not, whenever the race preference is triggered. In contrast to the program approved by the Court in *Grutter*, the District's plan fails to consider any other way in which an individual student may contribute to diversity and operates as a policy of "automatic acceptance or rejection" based solely on skin color; this is

unconstitutional. *Gratz*, 529 U.S. at 271-72.

d. The race preference causes undue harm.

To be narrowly tailored, a racial classification must not unduly burden those affected by it. *Grutter*, 539 at 341. As demonstrated above, the race preference merely tinkers with the white/nonwhite ratios in a few schools that are already diverse, for no discernible benefit. *Supra*, pp. 16-17. The price for this racial tinkering is high: hundreds of students, solely because of race, are denied admission to their chosen schools. *Supra*, pp. 7-9. The District and the *en banc* majority below try to minimize the burden on students by arguing that students have no constitutional right to attend any particular school. That is beside the point. Solely because of race students are denied a benefit otherwise available – attendance at their preferred schools – and this burdens many families. *Supra*, pp. 7-9. While the District has no obligation to allow students to select schools, once schools are made available in this way (a decision Parents commends), the District cannot deny admission on the basis of race without inflicting an injury that offends the Constitution. *See, e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).[19]

Because the District's plan imposes significant burdens, and subjects hundreds of students to race discrimination with no demonstrable benefits, the plan is not narrowly tailored.

e. The plan has no sunset provision.

Narrow tailoring requires that any racial classification

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[19] That the race preference sometimes discriminates against white students and sometimes against nonwhite students does not save it either, as Equal Protection rights are individual rights. *Supra*, pp. 32-33.

"be limited in time" and "have a logical end point." *Grutter*, 539 U.S. at 342. Apart from the possibility (present with every governmental use of race) that the race preference might be abandoned someday, the District's plan has no stopping point. On the contrary, so long as school quality is perceived to vary, families choose to live near people of similar ethnic heritage, and parents choose schools close to home, it is certain that some school will not meet the District's narrow definition of "balanced," and race-based admissions will continue.

IV. The Deference Advocated by the Majority and Concurring Opinions Below Is Incompatible with the Equal Protection Clause.

A. The Court of Appeals Improperly Deferred to Local School Boards.

The *en banc* majority purported to apply strict scrutiny but deferred to local school officials on the existence of a compelling interest in maintaining its desired white/nonwhite ratio and on key elements of the narrow tailoring inquiry. According to the *en banc* majority, "[t]he Supreme Court repeatedly has shown deference to school officials at the intersection between constitutional protections and educational policy," Pet. App. 52a n.33, and for that reason, "afford[ed] deference to the District's judgment similar to that which *Grutter* afforded the university." *Id.* For example, rather than strictly scrutinizing whether a race-based plan was necessary, the majority found it sufficient that the District "*reasonably concluded* that a race-neutral alternative would not meet its goals." Pet. App. 52 (emphasis added). Likewise, the majority deferred to the District and "presume[d] ... that school officials will demonstrate a good faith commitment" to terminating the use of race when appropriate. Pet. App. 61. This deference accorded the District by the majority below is inconsistent

with strict scrutiny. *Johnson*, 543 U.S. at 506 n.1.

By the artifice of deference, the majority below avoided this Court's command that any racial classification by any government entity satisfy the strictest judicial scrutiny. If deference to a government employing an allegedly benign racial classification is permitted, lower courts will be forced to determine which racial classifications are benign (and whose defenders are thus entitled to deference) and which are motivated by racial politics, stereotypes, or hostility (and thus are subject to true strict scrutiny). But the Court has repeatedly rejected relaxed scrutiny of so-called benign racial classifications. *Johnson*, 543 U.S. at 505-06; *Gratz* 539 U.S. at 270; *Adarand*, 515 U.S. at 224. Scrutiny should not now be relaxed under the guise of "deference."

B. "Academic Freedom" Does Not Justify Deference to Local School Boards.

The justification offered for deference to college and graduate school administrators – "academic freedom" guaranteed by the First Amendment – does not support deference to local school board members. *See* Jay P. Lechner, *Learning from Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest in Elementary and Secondary Education,* 32 S.W.U.L. Rev. 201, 215 (2003). A university's academic freedom includes the rights "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Bakke,* 438 U.S. at 312 (Powell, J., concurring); *see also Keyishan v. Board of Regents,* 385 U.S. 589 (1967); *Sweezy v. New Hampshire,* 354 U.S. 234 (1957). No comparable line of cases suggests that local school boards enjoy the same freedom, especially on matters of race.

On the contrary, the Court has refused to allow school districts to employ racial classifications to accomplish racial

diversity among teachers. *Wygant,* 476 U.S. at 274-76 (plurality). The Court has also refused to allow school districts to determine who may be admitted. Public secondary education "must be made available to all on equal terms." *Plyler v. Doe,* 457 U.S. 202, 221-23 (1982); *accord, Brown,* 347 U.S. 483. The "special niche" in our constitutional tradition occupied by institutions of higher education is not shared by local government officials who, history shows, are capable of articulating excuses for even the most egregious violations of the Equal Protection Clause.

C. Deference to the Seattle School District Is Especially Unwarranted.

The board of directors of the District is an elected body, subject to the same political pressures that affect other politicians,[20] and this Court made it clear in *Brown* that the Equal Protection Clause is not subordinate to the judgment of local officials. *Brown,* 347 U.S. 483; *see also Goss,* 419 U.S. at 574 ("The Fourteenth Amendment ... protects the citizens against the State itself, and all of its creatures – Boards of Education not excepted.") (citation omitted).

The record here shows that use of a race preference is not necessary to obtain – and does little to advance – the benefits the District claims to seek and that the school board has not earnestly sought to obtain those benefits through race-neutral means. *Supra,* pp. 16-19. Rather, the record shows what the panel majority called "a stubborn adherence

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[20] *See, e.g.*, "*The dynamics of racial politics,*" The Seattle Times, Nov. 9, 2005, available at: http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=lynne09&date=20051109&query=school+board+election; Seattle Public Schools, *Definitions of Racism,* available at: http://www.fourmilab.ch/fourmilog/archives/seattle_schools_racism_2006-05-29/searace.htm; Seattle Public Schools, *Equity and Race Relations,* available at http://www.seattleschools.org/area/equityandrace/index.dxml (noting "failed concepts" of melting-pot or color-blind mentality).

to the use of race for race's sake," Pet. App. at 179a, and pursuit of racial proportionality because, according to the District, "skin tone matters," *supra*, p. 13.

D. Relaxing the Standard of Review, Whether Explicitly or Implicitly through Deference, Would Encourage Racial Balancing.

"A lower standard [of review] signals that the Government may resort to racial distinctions more readily." *Metro Broad.*, 497 U.S. at 610 (O'Conner, J., dissenting). As Justice Kennedy observed, a deferential standard of review "would validate ... any number of future racial classifications the Government may find useful." *Id.* at 633 (Kennedy, J. dissenting).

Deferring to the District, instead of applying genuine strict scrutiny, would deprive Seattle residents of the ingenuity and efforts of school officials to improve education and accomplish genuine diversity without reflexive resort racial classifications. It would allow the District to continue to avoid improving the weakest and most racially imbalanced schools. *See Grutter,* 539 U.S at 393 (Kennedy, J., dissenting) ("By deferring ... the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration."). As the record shows, the District can provide secondary education to its students in an integrated school district, with racially diverse schools, and without resort to race-based admissions decisions. *Supra,* pp. 13-17. This is further confirmed by the District's apparent new interest in reconsidering the use of race-based assignments in the future. *See* Opposition to Petition at 20.

Deference would also condone racial balancing in all aspects of public education (sports teams, student government, the staff of the school paper, etc.). By logical

extension, other government entities will argue that racial balancing, and its supposed civic and social benefits, are sufficiently important to permit use of racial classifications. Lower courts have already begun reading *Grutter* to relax the scrutiny applied to supposedly benign racial balancing measures by government in other contexts. *E.g., Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (police officer hiring); *Lomack v. City of Newark*, 2005 WL 2077479 (2005) (promoting fire station diversity).

The patchwork of racial preferences warned against in *Croson*, 488 U.S. at 499, will result unless the Court now makes clear that strict scrutiny still applies and that other governmental actors are not entitled to the deference accorded universities seeking genuine diversity. If the Court does not reverse the decision below, it will move the country away from the Equal Protection Clause's "'ultimate goal' of 'eliminat[ing] entirely from governmental decision-making such irrelevant factors as a human being's race.'" *Croson*, 488 U.S. at 495 (plurality opinion) (quoting *Wygant*, 476 U.S. at 320 (Stevens, J., dissenting) (alteration in original)); *see also Miller*, 515 U.S. at 911; *Shaw*, 509 U.S. at 657.

CONCLUSION

The Court should reverse the judgment in favor of the District and remand for entry of judgment in favor of the petitioner, for entry of an injunction prohibiting the District from making race-based student assignments, and for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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